

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LOURDES NAJERA
Claimant

VS.

DOLD FOODS INC.
Respondent
Self Insured

)
)
)
)
)
)
)

Docket No. 250,271

ORDER

Claimant requested Appeals Board review of Administrative Law Judge John D. Clark's January 25, 2002, Award. The Appeals Board heard oral argument in Wichita, Kansas on August 16, 2002.

APPEARANCES

Claimant appeared by her attorney, Chris A. Clements of Wichita, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Douglas D. Johnson of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board (Board) has considered the record and has adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) awarded claimant a 13 percent permanent partial general disability based on permanent functional impairment. There was no work disability claim because claimant continued to perform her regular job at the same pre-injury weekly wage.¹

On appeal, claimant argues the permanent functional impairment ratings of Dr. Pedro A. Murati and Dr. George L. Lucas, are more representative of claimant's permanent functional impairment and should be averaged for a 19 percent permanent partial general disability award instead of the 13 percent awarded by the ALJ.

¹ See K.S.A. 44-510e(a).

Conversely, respondent argues claimant failed to prove she suffered an accidental injury that arose out of and in the course of her employment with respondent. Respondent requests the Board to reverse the Award and deny claimant's request for workers compensation benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the parties' arguments, the Board finds the Award should be affirmed.

The Board finds the ALJ's findings and conclusions, as expressed in the Award, are accurate and supported by the record. It is not necessary to repeat those findings and conclusions in this Order. The Board approves those findings and conclusions and adopts them as its own.

Claimant's job of packaging bacon required her to perform intensive repetitive bilateral hand activities throughout her 8 hour work shift. Three physicians testified in this case and all three expressed opinions on causation and permanent functional impairment.

Claimant's treating physician was orthopedic surgeon Dr. J. Mark Melhorn. Dr. Melhorn provided conservative medical treatment for claimant's osteoarthritis of the DIP joints of her fingers on both hands. Dr. Melhorn opined that claimant's osteoarthritis condition was aggravated by her regular work activities. He released claimant to her regular work activities with task rotation. In accordance with the American Medical Ass'n *Guides to the Evaluation of Permanent Impairment* (4th ed.) (AMA Guides [4th ed.]), Dr. Melhorn assessed claimant with a 10 percent whole body permanent functional impairment for her bilateral upper extremity injuries. During the period that Dr. Melhorn treated claimant, he had her twice undergo nerve conduction testing. The results of both of the nerve conduction tests were normal. Based on those nerve conduction tests and his clinical findings, Dr. Melhorn opined that claimant had not suffered bilateral carpal tunnel injuries.

At respondent's attorney's request, orthopedic surgeon Dr. George L. Lucas examined claimant on one occasion on April 16, 2001. Dr. Lucas also found claimant with degenerative osteoarthritis of the DIP joints. He also found that claimant did not suffer from bilateral carpal tunnel injuries. Dr. Lucas opined that claimant's osteoarthritis condition was aggravated by her employment activities. Utilizing the AMA Guides (4th ed.), Dr. Lucas assessed claimant with a 16 percent whole body permanent functional impairment for her bilateral upper extremity injuries.

At claimant's attorney's request, claimant was examined and evaluated by physical medicine and rehabilitation physician Dr. Pedro A. Murati on two occasions, December 1, 1999, and June 6, 2001. Dr. Murati diagnosed claimant with osteoarthritis of both hands, bilateral carpal tunnel syndrome, probable right cubital ulnar syndrome and bilateral

shoulder pain. Dr. Murati found claimant suffered a 22 percent whole body permanent functional impairment also utilizing the AMA Guides (4th ed.). During Dr. Murati's deposition testimony, he agreed if the bilateral carpal tunnel syndrome rating was eliminated from the 22 percent rating, then the rating would be 13 percent. Dr. Murati attributed claimant's permanent injuries to her regular work activities while employed by the respondent.

Respondent argues that claimant's arthritic condition is not compensable because the condition is a progressive disease and any activity whether it be at work or not aggravates the condition and makes it worse.² The Board acknowledges that arthritis is a progressive disease and all of the three physicians who testified in this case agree with that conclusion. The Board also acknowledges that the progressive disease can be aggravated by daily living activities whether at work or not at work.

Here, however, the Board finds there is no evidence in the record that claimant's daily living activities required her to perform the intensive repetitive hand activities as she had to perform for 8 hours a day 5 days a week at work. Dr. Melhorn was asked if over activity regardless of where it occurred would aggravate the arthritic disease process. Dr. Melhorn replied, "Some activity is good for arthritis. Excess with regard to activity or the opposite inactivity could both contribute to or aggravate an arthritic condition."³ Likewise, Dr. Lucas opined that osteoarthritis tends to get worse with activities and stress to the joints.⁴ And Dr. Murati opined the more you move the arthritic joints the more aggravation you have.⁵

Based on the foregoing opinions of all three physicians, the Board finds claimant's osteoarthritis condition is a progressive disease but will progress more rapidly if aggravated by more intensive activities. The Board concludes that claimant's intensive repetitive hand work activities, on balance, have caused more aggravation and acceleration of her bilateral osteoarthritis upper extremity condition when compared to her daily living activities. Thus, the Board concludes the greater weight of the evidence proves claimant's bilateral osteoarthritis upper extremity condition is compensable.

The respondent relies on the *Boeckmann* case in contending that a degenerative condition, i.e., osteoarthritis is not compensable under the workers compensation act. But in this case, the Board finds the medical testimony supports the conclusion that claimant's

² See *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

³ Melhorn Depo. at 12-13.

⁴ Lucas Depo. at 13.

⁵ Murati Depo. at 10.

repetitive and intensive work activities aggravated and accelerated her osteoarthritis condition and caused her permanent disability.⁶

The Board also agrees with the ALJ that the permanent functional impairment opinions of orthopedic surgeon Drs. Melhorn and Lucas are more persuasive and should be averaged together in determining claimant's permanent functional impairment rating. Neither Dr. Melhorn nor Dr. Lucas found claimant had bilateral carpal tunnel injuries. Dr. Murati did find claimant had suffered bilateral carpal tunnel injuries but the Board is more persuaded by the opinions of the two testifying orthopedic surgeons on that issue.

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that ALJ John D. Clark's January 25, 2002, Award should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ of December 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Chris A. Clements, Attorney for Claimant
Douglas D. Johnson, Attorney for Respondent
John D. Clark, Administrative Law Judge
Director, Division of Workers Compensation

⁶ See *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 379- 380, 573 P.2d 1036 (1978) (distinguishing *Boeckmann* and held that a preexisting condition aggravated by claimant's usual work activities is a compensable injury).

LOURDES NAJERA

5

DOCKET NO. 250,271